No. 89-5809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT SAWYER,

Petitioner,

—v.—

LARRY SMITH, INTERIM WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*, AND BRIEF, OF STEPHEN H. SACHS, KEVIN BOSHEA, JOHN CRAFT, RALPH S. WHALEN, JR., KENNETH M. ROBINSON, ROGER C. SPAEDER, AND NEVETT STEELE, JR., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MICHAEL MILLEMANN
University of Maryland
Law School
500 Baltimore Street
Baltimore, Maryland 21201
(301) 328-8340

RANDY HERTZ
New York University
School of Law
249 Sullivan Street
New York, New York 10012
(212) 998-6430

Attorneys for *Amici Curiae*

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To the Honorable, the Chief Justice and Associate Justices, of the Supreme Court of the United States:

Stephen H. Sachs, Kevin Boshea, John Craft, Ralph S. Whalen, Jr., Kenneth M. Robinson, Roger C. Spaeder, and Nevett Steele, Jr., by counsel, respectfully request leave to file the attached brief amici curiae.

The consent of the attorney for the petitioner has been obtained and filed with the Clerk. The attorney for the respondent has declined consent.

Amici are former prosecuting attorneys. Stephen H. Sachs is the former Attorney General for the State of Maryland, during which time he enforced the capital punishment statute of that state. He also formerly served as the United States Attorney for the District of Maryland. Kevin Boshea and John Craft formerly served as assistant district attorneys in the Orleans Parish District Attorney's Office, New Orleans, Louisiana.

Mr. Boshea prosecuted a number of death penalty cases, in two of which the death penalty was imposed. Mr. Craft was the Chief of Appeals for several years, representing the State's interests in appeals by death-sentenced individuals. Ralph v. Whalen, Jr. formerly served as a special prosecutor for Orleans Parish, New Orleans, Louisiana, during which time he prosecuted death penalty cases. Kenneth M. Robinson, Roger C. Spaeder, and Nevett Steele, Jr. formerly served as assistant United States attorneys, Mr. Robinson and Mr. Spaeder in the District of Columbia, and Mr. Steele in the District of Maryland.

Amici were and are committed to the ethical ideal of "honorable and professional performance of prosecutorial duties." I American Bar Association, Standards for Criminal Justice, The

Prosecution Function, Commentary to Standard 3-1.1 (2d ed. 1981). As persons who have borne the responsibilities of "administrator[s] of justice" (id., Standard 3-1.1(b)), amici view it as their obligation to provide their views to the Court concerning the egregious violations of law and ethical proscriptions by the prosecutor in this case. Moreover, as individuals who continue to be concerned with the fair and lawful administration of the criminal process, amici seek to ensure that this Court not erode the protections against abuses of the writ by allowing a litigant -- whether the prosecution or the defense -- to reap benefits from intentionally violating state law or procedural rules.

Accordingly, Mr. Sachs and his colleagues move for leave to file the attached brief as amici curiae.

Respectfully submitted,

RANDY HERTZ
New York University
School of Law
249 Sullivan Street
New York, New York 10012
(212) 998-6430

MICHAEL MILLEMANN
University of Maryland
Law School
500 Baltimore Street
Baltimore, Maryland 21201
(301) 328-8340

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INTERESTS OF AMICI

The interests of Amici in filing this brief have been set forth in the preceding motion.

SUMMARY OF ARGUMENT

As this Court has stated, a prosecuting attorney "may prosecute with earnestness and vigor -- indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). As Amici will show, the prosecutor in this case struck blows that were undeniably "foul," violating both the American Bar Association's Standards Relating to the Prosecution Function and a state law rule that had been in existence for more than fifty years. As Part I of the brief will demonstrate, the prosecutor intentionally violated the applicable law and ethical rules. Part II

will show that the underlying rationale of the retroactivity doctrine of Teague v. Lane calls for refusing to reward a litigant who, like the prosecutor in this case, intentionally "flout[s] . . . state procedures for tactical or other reasons." Dugger v. Adams, 109 S. Ct. 1211, 1216 (1989).

ARGUMENT

I.

The Prosecutor Intentionally Violated State Law and Ethical Proscriptions

The prosecutor in this case made the following statements in closing argument to the jury:

> The law provides that if you find one of these aggravating circumstances then what you are doing as a jury, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this

> man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State legislature that this is the type of crime that deserves that penalty. It is merely a recommendation . . . .
>
> You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree . . . . All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less.
>
> Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say that you are wrong so I ask that you do have the courage of your convictions . . . .

Appendix to Petition for A Writ of Certiorari, at A-45, A-47, A-48. In rebuttal argument, the prosecutor returned to this theme again, stating:

> I ask that you recommend because all you are doing is making a recommendation. I ask that you recommend to this Court and to any other Court that reviews Robert Sawyer's case that as a jury based on all the facts and circumstances within your knowledge you recommend the death penalty.

Id. at A-52, A-53.

These arguments intentionally misstated the law concerning the effect of a jury's decision to impose a death sentence. The prosecutor informed the jury that its sentencing verdict would be "merely a recommendation" (id. at A-45) and "only the initial step . . . [of] saying . . . that this man['s] . . . actions could be prosecuted to the fullest extent of the law" (id. at A-47); but Louisiana law clearly provided that a jury's decision to recommend death was binding upon the trial court. La. Code Crim. Proc., art. 905.8.

Equally plainly, the prosecutor's

statements violated applicable legal canons governing prosecutorial closing arguments. As both the majority and dissent recognized in the en banc opinions below, "Louisiana . . . had, before Caldwell [v. Mississippi, 472 U.S. 320 (1985)] developed common law rules forbidding misleading jury argument about the importance of the jury's decision." Sawyer v. Butler, 881 F.2d 1273, 1290 (5th Cir. 1989). Accord, id. at 1299-1300 (King, J., dissenting) ("[a]t least five years before the Supreme Court decided Caldwell, the Louisiana Supreme Court held that arguments that diluted the jury's sense of responsibility for imposing a capital sentence injected an arbitrary factor in the jury's decision and invalidated the sentence").

The prosecutor surely was aware of his obligation not to divert the jury from

its duty to impose a punishment deemed appropriate on the basis of the circumstances of the offense and the character of the defendant, by interjecting irrelevant and inaccurate concerns about the consequences of imposing a particular sentence. The state law prohibitions against tactics of this sort had been in effect for more than a half-century. In State v. Johnson, 151 La. 625, 92 So. 139 (1922), the Louisiana Supreme Court reversed a death sentence because the prosecutor's closing argument injected irrelevant and misleading concerns about the likelihood of early parole in the event of a sentence of life imprisonment. The prosecutor in Johnson had argued:

> "[T]he evidence in this case demands the death penalty, and while the law authorizes the jury to return a verdict of guilty as charged, without capital punishment, which would call for the sentence of life imprisonment in the penitentiary, this law is a farce, or rather a fiction of the law. It does not mean what it says. It only means that the defendant would be sentenced to serve his natural lifetime in the penitentiary, and history shows that, after a short period of time, say 5, 10, or 15 years, he would be turned loose again on society."

Id. at 632, 92 So. at 142. The Louisiana Supreme Court held that this statement "transcended the bounds of legitimate and proper argument" (id. at 633, 92 So. at 142) and mandated the reversal of the death sentence (see id. at 635, 92 So. at 143). The court explained:

> In all prosecutions for capital offenses in this state, the discretionary power is vested in the jury to qualify its verdict by finding the accused guilty without capital punishment, which means life imprisonment in the penitentiary at hard labor. In the exercise of this power the jury should be left free and untrammeled and should not be influenced by the personal opinion of the prosecuting officer as to the wisdom and expediency of the law, and the effect which, in his opinion, would result from a qualified verdict. . . . Simply because the law-making power of the state has

> seen proper, in the exercise of its wisdom, to create a pardoning board, . . . and just because under that system, a life termer is occasionally pardoned or paroled, furnishes no sufficient reason in law for an appeal to the jury to disregard the statute which vests in them the discretionary power to qualify the verdict, and to treat that law as a farce and utterly without any meaning whatever. . . .
>
> The harmful effect of such an opinion of the law officer and of such an intemperate appeal to the jury must be apparent . . . ."

Id. at 633-34, 92 So. at 142.

In State v. Henry, 196 La. 217, 198 So. 910 (1940), the Louisiana Supreme Court similarly reversed a death sentence because the prosecutor argued to the jury that "politicians manipulating the [parole] boards often secured the parole and freedom of convicted murderers before they had served a sufficient part of their sentence." Id. at 261, 198 So. at 924.

In a number of other decisions which preceded the trial in this case, the

Louisiana Supreme Court enforced the state law rule that the prosecutor may not improperly influence the jury's decisionmaking by misstating the law or injecting extraneous influences. See, e.g., State v. McGhee, 350 So.2d 370, 375 (La. 1977) (prosecutor's statement in voir dire "that the presumption of theft is 'as strong as' the presumption that a defendant is presumed innocent . . . prejudiced defendants' constitutional rights to be presumed innocent and to be found guilty only if the state has proved them guilty beyond a reasonable doubt"); State v. Lee, 346 So.2d 682, 684 (La. 1977) ("[w]hen a jury is informed by the state that the accused was convicted of the crime on a previous occasion, the defendant's right to a fair trial, protected by both the federal and state constitutions, has been violated").

At the time of the trial in this case, there was also caselaw in numerous other jurisdictions which expressly prohibited prosecutors from misleading a jury into believing that its verdict would be merely advisory or that any errors in the verdict could be fully corrected on appeal. See, e.g., Beard v. State, 19 Ala. App. 102, 95 So. 333, 334-35 (1923); People v. Morse, 60 Cal.2d 631, 653, 388 P.2d 33, 47, 36 Cal. Rptr. 201, 215 (1964); Pait v. State, 112 So.2d 380, 384 (Fla. 1959); Hawes v. State, 240 Ga. 327, 335, 240 S.E.2d 833, 839 (1977); Shoemaker v. State, 228 Md. 462, 473-74, 180 A.2d 682, 688 (1961); People v. Johnson, 284 N.Y. 182, 187, 30 N.E.2d 465, 467 (1940); State v. Jones, 296 N.C. 495, 501, 251 S.E.2d 425, 429 (1979); State v. Gilbert, 273 S.C. 690, 698, 258 S.E.2d 890, 894 (1979). One such out-of-state case,

Prevatte v. State, 214 S.E.2d 365 (Ga. 1975), was cited in a Louisiana Supreme Court decision shortly before petitioner's trial, and described as a case in which a death sentence was reversed because "an unobjected to argument by a district attorney may have influenced the jury to impose a more severe sentence than unbiased judgment would have given." State v. Sonnier, 379 So.2d 1336, 1371 n.4 (La. 1979).

The ethical standards in effect at the time of petitioner's trial also explicitly prohibited prosecutorial arguments such as those made in this case. The ABA Standards Relating to the Prosecution Function stated:

> The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function Standard 5.8(d) (Approved Draft 1971). The Commentary to the Rule explained:

> References to the likelihood of other authorities, such as the governor or the appellate courts, correcting an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its decision.

Id., Commentary to Standard 5.8(d). In a related vein, the National Prosecution Standards promulgated in 1977 by the National District Attorneys Association reflected a keen awareness of the power of closing argument and the care with which such arguments had to be made in order to honor the prosecutor's dual responsibilities:

> The prosecutor's dual responsibility to seek justice and to vigorously present the government's case must at no other time be so delicately

balanced as at closing argument. Id. at 280. In keeping with this, Standard 17.17 (a) directed that "closing argument to the jury . . . be characterized by fairness [and] accuracy...." Id.

It can hardly be suggested that the prosecutor in this case was somehow unaware of these legal and ethical requirements. The ethical requirement is of the sort that every prosecutor is obliged to know. The text of the ethical rule had even been quoted in decisions of the Louisiana Supreme Court. See, e.g., State v. Kaufman, 304 So.2d 300, 308 (La. 1974) (quoting Standard 5.8(c) and referring to the ABA Standards Relating to the Prosecution Function as "authoritative"); State v. Governor, 331 So.2d 443, 454 (La. 1976) (Dixon, J., dissenting). It is also inconceivable

that the prosecutor was ignorant of the legal impropriety of such arguments, in light of the Louisiana Supreme Court decisions dating back to 1922 and the proliferation of contemporary caselaw in other jurisdictions outlawing the very practice the prosecutor elected to use in this case. Prosecutors' training materials available at the time specifically advised against such arguments, citing to caselaw of this sort. See, e.g., National District Attorneys Association, The Prosecutor's Deskbook 482 (P. Healy & J. Manak eds. 1971) ("If setting the punishment is a function of the jury and it is a one-stage trial, then it must be remembered that generally the prosecutor cannot comment on the possible action of the pardon and parole board."); Practicing Law Institute, II Manual for Prosecuting Attorneys 661 (M. Ploscowe ed.

1956) ("Not infrequently the prosecuting attorney will refer to the right of the accused to appeal, or his right to apply for parole after he has been committed, or that when these rights of the accused are exhausted, he may still apply for executive clemency. Where the purpose of these remarks is to convey the impression to the jury that the consequences of their verdict are of little importance since their errors will be corrected on appeal, the verdict may well be reversed.").

Nor can it be said that the prosecutor's violations of legal and ethical norms in this case were merely inadvertent. This was not an isolated slip in an otherwise proper argument. Rather, the prosecutor deliberately developed a theme and pressed it repeatedly throughout his initial and rebuttal arguments. His words were

carefully crafted, and the entire argument bears the earmark of calculated double-talk -- for example, the strained logic by which references to appellate courts were made ostensibly relevant in several unrelated ways -- practiced by a lawyer who well knows that what he is doing is wrong and seeks to camouflage it. Again and again, he hammered home the message that the jury need feel no responsibility for a verdict of death because any possible errors would be corrected by the trial court or the appellate courts.

As the Standards Relating to the Prosecution Function recognize, there is a great likelihood that a "jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with his office, but also because of the fact-finding

facilities presumably available to him." Commentary to Standard 5.8. In this case, the prosecutor systematically exploited the "special weight" (ibid.) of his position to manipulate the jury in the very way prohibited by state law and ethical requirements.

II.

The Retroactivity Doctrine Established in Teague v. Lane and Penry v. Lynaugh Does Not Apply to This Case Because the Prosecutor Acted in Bad Faith and in Violation of Existing Legal Rules

As a plurality of this Court explained in Teague v. Lane, 109 S. Ct. 1060 (1989), the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." Id. at 1074. The retroactivity doctrine

enunciated in Teague and adopted by a majority of the Court in Penry v. Lynaugh, 109 S. Ct. 2934 (1989), is primarily designed to assure that criminal proceedings which are properly conducted under the constitutional law in effect at the time of the proceedings are not upset simply because of subsequent changes in the law.

In its emphasis upon the interests of finality, the Teague/Penry doctrine continues the traditional retroactivity rule's approach of protecting the "justifiabl[e] . . . reli[ance]" of "prosecutors, trial judges, and appellate courts . . . on the [currently operative legal] standard[s]." Allen v. Hardy, 478 U.S. 255, 260 (1986); see also Linkletter v. Walker, 381 U.S. 618, 636 (1965). As the Teague plurality explained, one of the costs of retroactive application of

constitutional rules is the "'understandabl[e] . . . frustrat[ion]'" of those "'state courts . . . [which] faithfully appl[ied] . . . existing constitutional law.'" 109 S. Ct. at 1075 (quoting Engle v. Isaac, 456 U.S. 107, 128 n. 33 (1982)). See also Teague, supra at 1074, quoting Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374 (1940) ("'[q]uestions of . . . prior determinations deemed to have finality and acted upon accordingly . . . demand examination'") (emphasis added). The Teague/Penry rule protects the interests of finality and justifiable reliance by limiting the application of new constitutional rules which the "state courts cannot 'anticipate, and so comply with.'" Teague, supra at 1075 (quoting Brown v. Allen, 344 U.S. 443, 534 (1953) (concurring opinion of Justice Jackson)).

As Justice Harlan explained in his exposition of the retroactivity approach adopted by the Teague plurality, this approach achieves a proper balance between "various competing alternatives, including . . . the extent to which justifiable expectations have grown up surrounding one rule or another." Mackey v. United States, 401 U.S. 667, 677 (1971) (separate opinion of Justice Harlan).

The type of "justifiable reliance" protected by both the Teague/Penry and Linkletter standards is, of course, "'good-faith reliance.'" Hankerson v. North Carolina, 432 U.S. 233, 241 (1977); Jenkins v. Delaware, 395 U.S. 213, 219 (1969). A prosecutor who willfully violates the applicable law -- whether that be the commands of the federal constitution, state law, or professional ethics -- should not be permitted to claim

the benefits of the Teague/Penry doctrine. Such conduct cannot be considered "justifiable" reliance within the meaning or spirit of any cognizable non-retroactivity rule. Moreover, as this Court has long recognized, litigants are equitably estopped from reaping benefits by intentional, bad faith violations of constitutional or state law. Cf. Dugger v. Adams, 109 S. Ct. 1211, 1216-17 (1989) (declining to "exercise our equitable power to overlook [the defendant's] . . . state procedural default," in part because "there was . . . reason for suspecting that defense counsel was flouting state procedures for tactical or other reasons"); Amadeo v. Zant, 108 S. Ct. 1771, 1776-77 (1988) (the "cause" requirement of Wainwright v. Sykes, 433 U.S. 72 (1977), will not be applied in favor of the prosecution in cases in which

the prosecutor interfered with the defendant's compliance with the defaulted procedural rule); Oregon v. Kennedy, 456 U.S. 667, 676 (1982) (double jeopardy doctrine permitting a retrial following a mistrial requested by the defendant will not be applied in favor of the prosecution if the prosecutor engaged in conduct "intended to 'goad' the defendant into moving for a mistrial").

The prosecutor in this case repeatedly and willfully "flout[ed] . . . state [law] [and ethical rules]. . . for tactical . . . reasons." Dugger v. Adams, supra, 109 S. Ct. at 1216. To reward this conduct by denying relief to the petitioner would be in direct contravention of the rationale and purposes of this Court's retroactivity doctrine.

CONCLUSION

As the ABA Standards Relating to the Prosecution Function emphasize, "[t]he duty of the prosecutor is to seek justice, not merely to convict." Standard 1.1(c). The prosecutor in this case sacrificed state law, professional ethics, and justice, solely for the sake of procuring a sentence of death. His actions were the very antithesis of "justifiable reliance" on existing law. Thus, whatever the effect of the "new rule" and "old rule" doctrines in other cases, the Teague/Penry rule should not be applied to bar the retroactive application of Caldwell v. Mississippi to this case.

Dated: March 2, 1990

Respectfully submitted,

RANDY HERTZ
New York University
School of Law
249 Sullivan Street
New York, N.Y. 10012
(212) 998-6430

MICHAEL MILLEMANN
University of Maryland
Law School
500 W. Baltimore Street
Baltimore, Maryland 21201
(301) 328-8340

Attorneys for Amici Curiae